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No. 07-___

In the
Supreme Court of the United States

TED A. BRODOWY, DIRK BROWN, CAROLYN M. GANDY, RON D. GANDY, TRACY JENSON, KENNETH B. KARNATH, JONATHAN A. MENDELSON, CLYDE A. SMITH, SHARON WILKINS, and MARILYN YAMAMOTO,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Federal Circuit Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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September 20, 2007

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Federal Circuit's dismissal of Petitioners' case on the merits for having allegedly failed to state a claim upon which relief could be granted without affording Petitioners an opportunity to be heard on the merits, and because that court did not take the factual allegations within Petitioners' complaint as true, conflict with Civil Rule 12 and this Court's decisions in *Singleton, Chief, Bureau of Medical Services, Department of Health and Welfare of Missouri v. Wulff*, 428 U.S. 106 (1976) and *Jones v. Bach*, 27 S. Ct. 910 (2007)?

2. Did the Federal Circuit's decision that Petitioners were not entitled to application of 5 U.S.C. §5334(b) to their transfer to higher grade facilities in 1999 while under the GS Pay System conflict with that statutory provision and this Court's decision in *United States v. Clark*, 454 U.S. 555 (1982)?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), Petitioners state that all parties to the proceedings appear in the caption of the case on the cover page.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 1

RULE 14.1(b) STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

CITATIONS OF OPINIONS AND ORDERS 1

JURISDICTION 1

STATUTES AND RULES INVOLVED 1

STATEMENT OF THE CASE 3

I. INTRODUCTION. 3

II. THE UNDERLYING FACTS. 5

III. PROCEEDINGS BEFORE THE COURT OF CLAIMS 9

IV. PROCEEDINGS BEFORE THE COURT OF APPEALS 11

REASONS FOR GRANTING THE PETITION 13

I. THIS COURT SHOULD GRANT THE PETITION BECAUSE THE FEDERAL CIRCUIT'S DISMISSAL OF PETITIONERS' CASE ON THE MERITS FOR HAVING ALLEGEDLY FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED WITHOUT

AFFORDING PETITIONERS AN OPPORTUNITY TO BE HEARD ON THE MERITS, AND BECAUSE THAT COURT DID NOT TAKE THE FACTUAL ALLEGATIONS WITHIN THEIR COMPLAINT AS TRUE, CONFLICTED WITH CIVIL RULE 12 AND THIS COURT'S DECISIONS IN *SINGLETON, CHIEF, BUREAU OF MEDICAL SERVICES, DEPARTMENT OF HEALTH AND WELFARE OF MISSOURI V. WULFF*, 428 U.S. 106 (1976) AND *JONES V. BACH*, 27 S. CT. 910 (2007) 13

A. COURT OF APPEALS DISMISSED PETITIONERS' CLAIMS ON THE MERITS PURSUANT TO CIVIL RULE 12 WITHOUT AFFORDING PETITIONERS AN OPPORTUNITY TO PRESENT EVIDENCE IN SUPPORT OF THEIR CLAIMS ON THE MERITS IN CONFLICT WITH THIS COURT'S DECISION IN *SINGLETON, CHIEF, BUREAU OF MEDICAL SERVICES, DEPARTMENT OF HEALTH AND WELFARE OF MISSOURI V. WULFF*, 428 U.S. 106 (1976) 14

B. COURT OF APPEALS DISMISSED PETITIONERS' CLAIMS ON THE MERITS PURSUANT TO CIVIL RULE 12 BY IMPERMISSIBLY REJECTING FACTUAL ALLEGATIONS WITHIN PETITIONERS' COMPLAINT IN CONFLICT WITH THIS COURT'S DECISION IN *JONES V. BACH*, 127 S. CT. 910 (2007) 16

II. THIS COURT SHOULD GRANT THE PETITION BECAUSE THE FEDERAL CIRCUIT'S DECISION THAT PETITIONERS WERE NOT ENTITLED TO APPLICATION OF 5 U.S.C. §5334(B) TO THEIR TRANSFER TO HIGHER GRADE FACILITIES IN 1999 WHILE UNDER THE GS PAY SYSTEM CONFLICTS WITH THAT STATUTORY PROVISION AND THIS COURT'S DECISION IN *UNITED STATES V. CLARK*, 454 U.S. 555 (1982) 19

CONCLUSION 22

APPENDIX

TABLE OF AUTHORITIES

Page

Cases

Jones v. Bach
127 S. Ct. 910 (2007) 4, 13, 14, 17, 21

National Air Traffic Controllers Ass'n. v. Sec'y. of DOT
97 F.Supp 874 (N.D. Ohio 1998) 6, 7, 10

Singleton, Chief, Bureau of Medical Services, Department of Health and Welfare of Missouri v. Wulff Atkinson v. Sinclair Refining Co.
428 U.S. 106 (1976) 4, 13, 14, 21

Scheuer v. Rhodes
416 U.S. 232 (1974) 5, 17

United States v. Clark
454 U.S. 555 (1982) 5, 19, 20, 22

Statutes

5 U.S.C. § 5334(b)
..... 1, 3, 4, 8, 9, 10, 11, 12, 16, 18, 19, 21, 22

28 U.S.C. § 1254(1) 1

Rules

USCS Ct. Civil Rule 12 .... 2, 3, 4, 5, 12, 13, 14, 16, 17, 21

USCS Ct. Civil Rule 56 17

PETITION FOR A WRIT OF CERTIORARI

CITATIONS OF OPINIONS AND ORDERS

The opinion of the U.S. Court of Appeals for the Federal Circuit is reported at 482 F.3d 1370 (Fed. Cir. 2007). (App. 1A.) The Federal Circuit's Order denying Petitioners' petition for rehearing is unreported. (App. 32A.) The judgment and opinion of the U.S. Court of Federal Claims are unreported. (App. 12A, 13A.)

JURISDICTION

The Federal Circuit's opinion and judgment were entered on April 12, 2007. (App. 1A.) The Federal Circuit denied Petitioners' petition for rehearing on June 22, 2007. (App. 32A.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

5 U.S.C. §5334(b) provides:

An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred. If, in the case of an employee so promoted or transferred who is receiving basic pay at a rate in excess of the maximum rate of his grade, there is no rate in the higher grade which is at least two step-increases above his existing rate of basic

pay, he is entitled to-- (1) the maximum rate of the higher grade; or (2) his existing rate of basic pay, if that rate is the higher.

USCS Claims Court Civil Rule 12(b) provides:

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) [not used], (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under RCFC 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in RCFC 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by RCFC 56.

STATEMENT OF THE CASE

I. Introduction

Petitioners Ted A. Brodowy, Dirk G. Brown, Carolyn M. Gandy, Ron D. Gandy, Tracy A. Jenson, Kenneth B. Karnath, Jonathan A. Mendelson, Clyde A. Smith, Sharon Wilkins, and Marilyn Yamamoto are ten former or current air traffic controllers employed at air traffic facilities around the country. The factual circumstance giving rise to this lawsuit occurred in 1999, when Petitioners transferred from their Level 1 air traffic facilities to higher grade air traffic facilities under the GS pay system, and yet respondent FAA did not apply 5 U.S.C. §5334(b) to their transfer, so as to confer upon them a two step increase in pay under the GS system, at their new higher grade facility.

On August 31, 2005, Petitioners filed a complaint in the court of claims seeking an order that would direct respondent FAA to apply §5334(b) to them upon their transfer to higher grade facilities for purposes of establishing their appropriate GS grade and step level at that facility under the GS pay system. Respondent never answered the complaint, but instead filed a motion to dismiss pursuant to Civil Rule 12 asserting that the court of claims lacked subject matter jurisdiction over this case. On July 11, 2006, the court of claims granted respondent's motion to dismiss Petitioners' complaint.

Petitioners timely appealed from the court of claims' dismissal of their complaint for lack of subject matter jurisdiction to the Federal Circuit

Court of Appeals. In a decision issued on April 12, 2007, that court agreed with Petitioners that the court of claims erred in dismissing Petitioners' complaint for lack of subject matter jurisdiction. However, the court of appeals rejected Petitioners' factual allegation within their complaint that they transferred to their higher grade facilities in 1999 while under the GS pay system and dismissed Petitioners' complaint on the merits for allegedly having failed to state a claim upon which relief may be granted. On June 22, 2007, the court of appeals denied Petitioners' petition for rehearing.

It is from the decision of the court of appeals that Petitioners have filed their instant petition for a writ of certiorari with this Court. This Court should grant this petition for the following reasons:

1) The Federal Circuit dismissed Petitioners' case on the merits for having allegedly failed to state a claim upon which relief could be granted without affording Petitioners an opportunity to be heard on the merits, and failing to take the factual allegations within their complaint as true, in conflict with Civil Rule 12 and this Court's decisions in *Singleton, Chief, Bureau of Medical Services, Department of Health and Welfare of Missouri v. Wulff*, 428 U.S. 106 (1976) and *Jones v. Bach*, 27 S. Ct. 910 (2007); and

2) The Federal Circuit's decision that Petitioners were not entitled to application of 5 U.S.C. §5334(b) for purposes of providing them with a two step increase in pay under

the GS pay system when they transferred to higher grade air traffic facilities in 1999 is in conflict with that statutory provision and this Court's decision in *United States v. Clark*, 454 U.S. 555 (1982).

II. The Underlying Facts

The facts giving rise to this lawsuit are as follows.[1] Prior to October 1998, all air traffic controllers, including Petitioners, were employed by the FAA at a Level 1 through Level 5 air traffic facility. (Complaint at ¶ 18; App. 38A.) The classification of a facility as a Level 1 through Level 5 depended upon the complexity and volume of the air traffic to be handled at that facility. (*Id.*)

During the period of 1994 through 1998, the FAA privatized the operations at 129 Level 1 air traffic controllers. This decision by the FAA caused all air traffic controllers at Level 1 facilities to either 1) relocate to another FAA facility in order to remain employed by the FAA as air traffic specialists, or 2) retire or resign from the Federal service. (Complaint at ¶¶ 16-17; App. 37A.)

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[1] Because Petitioners seek review of a decision by the court of appeals that dismissed their complaint for having allegedly failed to state a claim upon which relief can be granted pursuant to Civil Rule 12, as a matter of law all factual allegations within Petitioners' complaint are true and all reasonable inferences therefrom are to be drawn in Petitioners' favor. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Accordingly, Petitioners refer to the factual allegations within their complaint for purposes of setting forth the underlying facts in this case.

As a result of this decision by the FAA to privatize Level 1 air traffic facilities, the air traffic controllers' union challenged the privatization of Level 1 air traffic facilities in court. On March 2, 1998, in response to that judicial challenge, the U.S. District Court for the Northern District of Ohio in *National Air Traffic Controllers Ass'n. v. Sec'y. of DOT*, 97 F.Supp 874 (N.D. Ohio 1998), stayed the FAA's privatization of FAA operated Level 1 towers for the reason that the FAA had failed to engage in the proper cost/benefit requirements of the Office of Management and Budget Circular A-76. At the time of the court decision, the FAA had already privatized over 75% of its Level 1 air traffic facilities with the remaining Level 1 air traffic facilities scheduled for privatization in August, 1998. (Complaint at ¶ 22; App. 39A.) This decision delayed Petitioners from transferring from their Level 1 air traffic facility, previously scheduled for August 1998, to a higher grade air traffic facility. (Complaint at ¶ 24; App. 39A.)

In July, 1998, the FAA and National Air Traffic Controllers Association ("NATCA") entered a collective bargaining agreement ("CBA") regarding the institution of a new air traffic control (ATC) pay system, which was to go into effect October 1, 1998. This new pay system was created by reason of a $200 million surplus through the reduction of frontline personnel, which money was to be equitably divided up and distributed to controllers based upon their grade and step under the GS pay system. (Complaint at ¶¶ 31-32; App. 40A-41A.)

Conversion into the ATC pay system was based upon a formula tied into the air traffic controller's grade and step level under the (FG)GS pay system. (Complaint at ¶39; App. 44A.) Conversion into the ATC pay system was not supposed to deviate from the principle that each air traffic controller is to receive equal pay for substantially equal work. (Complaint at ¶33; App. 41A.) A conversion rule was adopted in the CBA for purposes of converting an air traffic controller from the GS pay system to the ATC pay system, based upon that employee's GS grade and step level at the time of conversion. (Complaint at ¶35; App. 41A.) The ATC pay system had pay bands, which were analogous to the pay steps under the GS pay system. (Complaint at ¶30; App. 40A.)

This ATC pay system went into effect on October 1, 1998 for all air traffic controllers situated at Level 2 through Level 5 facilities, who were converted into this pay system based upon their grade and step level in the GS pay system. (Complaint at ¶25; App. 39A.) The FAA did not convert Petitioners into the ATC pay system on October 1, 1998, but rather continued to pay them under the GS pay system. (Complaint at ¶27; App. 40A.)

In March 1999, the FAA concluded its due diligence in connection with the cost/benefit analysis as required by the court in *National Air Traffic Controllers Ass'n., supra,* and decided to privatize the remaining Level 1 air traffic facilities. (Complaint at ¶41; App. 45A.) In or about October, November, and December 1999 each of the

Petitioners transferred to higher grade air traffic facilities. (Complaint at ¶43; App. 45A.)

Upon reaching their higher grade air traffic facilities (a Level 2-5 facility under the GS system), the FAA did not apply 5 U.S.C. §5334(b) to them for purposes of granting them a two step increase in pay under the GS pay system. (Complaint at ¶ 46; App. 46A.) Rather, after arriving at their higher grade facilities, Petitioners converted into the ATC pay system based upon their GS grade and step level at their Level 1 facilities instead of the appropriate GS grade and step level assigned to their higher grade facilities. (*Id.*)

Because the FAA did not apply §5334(b) to Petitioners, which guaranteed a two step increase upon transfer to a higher level facility, for purposes of establishing Petitioners' GS grade and step at their new higher level facilities in 1999, they lost earned grade and pay steps under the GS pay system. (Complaint at ¶47; App. 46A.) This loss in grade and step under the GS system caused Petitioners to subsequently convert at a lower place on the ATC pay system. (*Id.*) All air traffic controllers who had transferred from Level 1 facilities to higher facilities during the years of 1994, 1995, 1996, and 1997, as part of the privatization of Level 1 air traffic facilities had §5334(b) applied to them for purposes of guaranteeing a two step increase in pay under the GS pay system at their higher grade facility. (Complaint at ¶19; App. 38A.)

III. Proceedings Before The Court of Claims

On August 31, 2005, the Petitioners filed suit in the U.S. Court of Federal Claims seeking an order that would require the FAA to apply 5 U.S.C. §5334(b) to them for purposes of granting them a two step increase in pay under the GS pay system upon their arrival at their at their higher grade facilities in or about October, November or December of 1999. Petitioners sought application of §5334(b) while under the GS pay system during this transfer, prior to their conversion into the ATC pay system at these higher grade facilities. On March 17, 2006, respondent filed a motion to dismiss Petitioners' complaint for lack of subject matter jurisdiction for allegedly having failed to cite to an applicable money mandating statute as a predicate for their complaint.

On July 11, 2006, the court of claims dismissed Petitioners' case for lack of subject matter jurisdiction finding that Petitioners had failed to cite to an applicable money mandating statute within their complaint. The court of claims acknowledged that 5 U.S.C. §5334(b) is a money-mandating statute stating, "None of the provisions cited by the Plaintiffs is money mandating, *except §5334(b).*" [Emphasis added.] (App. 30A.) However, the court rejected Petitioners' factual contention that their transfer to higher grade facilities consisted of two separate steps – *i.e.,* a transfer within the GS pay system to a new facility and second a conversion to the new ATC pay system. (App. 29A.) The court erroneously determined that Petitioners did not make that specific factual allegation within their complaint. (App. 29A.)

In that regard, Petitioners alleged at ¶¶ 52-61 of their complaint that they transferred to their higher grade facilities within the GS pay system, thus requiring application of §5334(b), and then converted into the ATC pay system. Specifically at ¶ 53 of their complaint, Petitioners alleged:

> "The United States unlawfully bypassed and violated its pay regulations by not applying 5 U.S.C. §5334(b) to Plaintiffs in or about October, November, and December 1999, for purposes of establishing their appropriate grade and step level at their new higher grade facility for purposes of conversion into the ATC pay system."

(App. 48A.) At ¶ 60 of their complaint, the Petitioners alleged that:

> "The Plaintiffs were entitled to transfer to their new ATC air traffic facilities in or about October, November, and December 1999, and have 5 U.S.C. §5334(b) applied for purposes of determining their appropriate grade and step level at their new facilities, and then convert into the ATC pay system through utilization of the Conversion Rule (Rule 35) in the same manner as all other air traffic controllers who converted into the ATC pay system who were not delayed by reason of the U.S. District Court Decision in *National Air Traffic*

> *Controllers Association, MEBA, AFL-CIO, supra*, that had vacated the privatization of Level 1 facilities because of the FAA's violation of law."

(App. 50A.) Petitioners could only surmise that the court of claims overlooked those allegations within their complaint when rendering its decision to dismiss their complaint for allegedly failing to cite to a money-mandating statute as a predicate for subject matter jurisdiction. Petitioners filed a timely appeal from that court's decision to the Federal Circuit Court of Appeals.

IV. Proceedings Before the Court of Appeals

Following briefing and oral argument, the court of appeals issued a decision on April 12, 2007 where it disagreed with the court of claims' disposition to dismiss Petitioners' case for lack of subject matter jurisdiction. (App. 11A.) That court found that because Petitioners sought relief in their complaint through application of §5334(b), that Petitioners' complaint was therefore predicated upon the application and enforcement of a money mandating statute sufficient to confer jurisdiction upon the court of claims. (*Id.*)

However, the court of appeals then proceeded to dismiss Petitioners' case on the merits finding that Petitioners had failed to state a claim upon which relief could be granted. (App. 11A.) That court concluded that Petitioners were not entitled to have §5334(b) applied to them upon transfer to higher grade facilities in 1999, finding Petitioners' assertion that their transfer occurred while they

were in the GS pay system to be conclusory because they "point to no factual evidence in dispute". (App. 7A.) The court of appeals determined that when the Petitioners moved to higher level facilities in 1999, they were moving from GS to non-GS positions and therefore under those circumstances §5334(b) was inapplicable. (App. 8A.) However, in determining that there was "no factual evidence in dispute", the court of appeals ignored that this case was not pending on a motion for summary judgment but rather on the government's motion to dismiss pursuant to Civil Rule 12. As such, Petitioners were not required to point to "factual evidence in dispute", but rather were required to point to factual allegations within their complaint to overcome the government's motion to dismiss.

Moreover, while the court of appeals asserted that Petitioners' complaint contends that the higher level air traffic facilities had transitioned into the ATC pay system, Petitioners disagree with that characterization and submit that it is air traffic controllers, not facilities, which transitioned into the ATC pay system. Under the GS pay system, the air traffic facilities to which Petitioners were transferring in 1999 were a Level 2 through Level 5 facility under the GS pay system, triggering their right to application of §5334(b). (Complaint at ¶29; App. at 40A.)

The court of appeals did not take as true the factual allegation within Petitioners' complaint that they transitioned to higher grade facilities in 1999 while under the GS pay system and draw all reasonable inferences from that allegation within

their favor. (Complaint at ¶¶52-61; App. 48A-51A.) As such, the court of appeals decision is in conflict with this Court's decision in *Jones v. Bock*, 127 S.Ct. 1910 (2007), where this Court held that a "complaint is subject to a dismissal for failure to state a claim if the allegations, taken as true, show that the Plaintiff is not entitled to relief". *Id.* at 920. Here, the court of appeals did not take factual allegations within Petitioners' complaint to be true.

Petitioners filed a timely petition for a panel re-hearing with the court of appeals. On June 22, 2007, the court of appeals denied Petitioners' petition for rehearing.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant the Petition Because the Federal Circuit Dismissed Petitioners' Case on the Merits for Having Allegedly Failed to State a Claim Upon Which Relief Could Be Granted Without Affording Petitioners an Opportunity to be Heard on the Merits, and Because That Court Did Not Take the Factual Allegations within Petitioners' Complaint as True, Conflicted with Civil Rule 12 and this Court's Decisions in *Singleton, Chief, Bureau of Medical Services, Department of Health and Welfare of Missouri v. Wulff*, 428 U.S. 106

(1976) and *Jones v. Bach*, 27 S. Ct. 910 (2007).

This Court should grant this petition for certiorari for the reason that the Federal Circuit dismissed Petitioners' case on the merits for allegedly having failed to state a claim upon which relief could be granted without affording Petitioners an opportunity to be heard on the merits, and because that court did not take the factual allegations within their complaint as true, in conflict with Civil Rule 12 and this Court's decisions in *Singleton, Chief, Bureau of Medical Services, Department of Health and Welfare of Missouri v. Wulff*, 428 U.S. 106 (1976) and *Jones v. Bach*, 27 S. Ct. 910 (2007) .

A. Court of Appeals Dismissed Petitioners' Claims on the Merits Pursuant to Civil Rule 12 Without Affording Petitioners An Opportunity To Present Evidence in Support of Their Claims on the Merits in Conflict With This Court's Decision in *Singleton, Chief, Bureau of Medical Services, Department of Health and Welfare of Missouri v. Wulff*, 428 U.S. 106 (1976).

In *Singleton, Chief, Bureau of Medical Services, Department of Health and Welfare of Missouri v. Wulff*, 428 U.S. 106 (1976), this Court reversed the judgment of a court of appeals that decided a case on the merits finding that the

petitioner had not had been afforded a reasonable opportunity to be heard on the merits. In *Wulff, supra*, this Court found that the petitioner had neither answered the complaint nor otherwise been provided with an opportunity to present evidence or make legal arguments in support of its position on the merits. This Court found that the court of appeals' resolution of the merits of the case to be an unacceptable exercise of appellate jurisdiction, holding:

> **It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.** In *Hormel v. Helvering*, 312 U.S. 552, 556 (1941), the Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues... [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence. **Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the statute. We think he**

> **was justified in not presenting those arguments to the Court of Appeals, and in assuming, rather, that he would at least be allowed to answer the complaint, should the Court of Appeals reinstate it.**

[Emphasis added.] *Id.* at 120.

Here, the court of appeals engaged in the same type of unacceptable appellate jurisdiction as the appellate court in *Wulff, supra*. When the court of appeals dismissed Petitioners' case on the merits for having allegedly failed to state a claim upon which relief could be granted, the court ignored that respondent never answered Petitioners' complaint and that Petitioner was never allowed an opportunity to conduct any discovery upon respondent for purposes of proving its factual allegations within their complaint.

Petitioners have never been provided with an opportunity to prove that they transferred to higher grade facilities while under the GS pay system in 1999, triggering the right to application of §5334(b) while under the GS pay system, prior to conversion into the ATC pay system. Therefore, this Court should grant certiorari and thereafter reverse the court of appeals, with instructions that this case be remanded to the court of claims so that Petitioners can be afforded an opportunity to prove this factual allegation within their complaint.

B. Court of Appeals Dismissed Petitioners' Claims on the Merits Pursuant to Civil Rule 12 By

Impermissibly Rejecting Factual Allegations Within Petitioners' Complaint in Conflict with *Jones v. Bach*, 127 S. Ct. 910 (2007).

Additionally, the court of appeals' decision to dismiss Petitioners' complaint on the merits for having allegedly failed to state a claim upon which relief could be granted pursuant to Civil Rule 12 conflicted with this Court's holding in *Jones v. Bach*, 127 S. Ct. 910 (2007), that "a complaint is subject to dismissal for failure to state a claim if the allegations, **taken as true**, show that the plaintiff is not entitled to relief." [Emphasis added.] *Id.* at 920. **Accord**, *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Here, the court rejected Petitioners' factual allegation within their complaint that they transferred to higher grade facilities in 1999 while under the GS pay system. The court of appeals asserted that such allegation was conclusory and that Petitioners did not point to any "factual evidence in dispute". (App. 7A.)

However, how could Petitioners point to factual evidence in dispute when respondent had not even answered their complaint? Further, this case was pending before that court on an appeal filed by Petitioners from a decision of the court of claims that dismissed their claims for lack of subject matter jurisdiction pursuant to Civil Rule 12. This case was not pending before the court of appeals on a motion for summary judgment pursuant to Civil Rule 56 on the merits of their claims.

Petitioners made the factual allegation in their complaint that they transferred to their higher grade facilities in 1999 while under the GS pay system. (Complaint at ¶¶52-61; App. 48A-51A.) If Petitioners are correct, there can be no dispute that Petitioners have stated a claim upon which relief could be granted.

5 U.S.C. §5334(b) provides, without any ambiguity, that where a federal employee transfers to a higher grade position under the GS system that employee is entitled to a two step increase in pay under the GS pay system. That is what Petitioners are requesting in this case. Contrary to the suggestion of the court below, Petitioners are not requesting a two step increase in pay under the ATC pay system. Because conversion into the ATC pay system is tied to an employee's GS grade and step, when the FAA did not confer Petitioners a two step increase in pay *under the GS pay system* upon their transfer to higher grade facilities in 1999, Petitioners were converted into the ATC pay system at a lower rate of pay than where they should have converted into that pay system. However, that does not change the fact that Petitioners are seeking application of §5334(b) to their transfer to higher grade facilities *under the GS pay system.*

Certiorari should be granted by this Court. Thereafter, the decision of the court of appeals should be reversed and this case remanded to the court of claims with instructions that Petitioners be afforded an opportunity to present evidence that supports the factual allegation within their complaint that they transferred from a Level 1

facility to a higher grade facility within the GS system in 1999, thus triggering application of § 5334(b) to them, prior to their conversion into the ATC pay system at that time.

II. This Court Should Grant The Petition Because The Federal Circuit's Decision That Petitioners Were Not Entitled To Application of 5 U.S.C. §5334(b) To Their Transfer to Higher Grade Facilities In 1999 While Under the GS Pay System Conflicts With that Statutory Provision and This Court's Decision in *United States v. Clark*, 454 U.S. 555 (1982).

This Court should grant the petition for the reason that the Federal Circuit's decision that Petitioners were not entitled to application of 5 U.S.C. §5334(b) to their transfer to higher grade air traffic facilities in 1999 while under the GS pay system conflicts with that statutory provision and this Court's decision in *United States v. Clark*, 454 U.S. 555 (1982). In *Clark, supra*, this Court held that a federal employee is entitled to have §5334(b) apply to transfers to a higher grade position within the GS pay system, ensuring a two step increase in pay when transferring to that higher grade position. In *Clark, supra*, this Court held that § 5334(b) did not apply to promotions between the WS and GS pay systems because there was no necessary or obvious relationship between those pay systems. This Court stated:

> **The absence of any indication that Congress intended § 5334(b) to**

> **apply to promotions into the GS from the WS is hardly surprising, since the two systems have no necessary or obvious relationship.** First, because the WS involves an entirely separate pay structure based on prevailing rates in local wage areas, no necessary overlap occurs between WS and GS salaries. In fact, since WS rates vary by locale, an employee changing from a WS position to a GS position could receive a greater salary, a lesser salary, or the same salary as another employee making the identical change in another part of the country. Moreover, although by definition a change to a higher grade within the GS system involves a change to a position with greater responsibility (see 5 U. S. C. § 5102(a)(5) (1976 ed., Supp. V)), no similar relationship necessarily exists between a WS grade and a GS grade.

Id. at 564.

Here, there is a necessary and obvious relationship between the ATC pay system and the GS pay system. The ATC pay system was created for air traffic controllers who were situated in the GS pay system for purposes of distributing an additional $200 million dollars to these air traffic controllers in pay. The ATC and GS pay systems were the same, but for this $200 million dollars to be distributed to those employees within the ATC pay system. Unlike in *Clark, supra*, where there was no necessary or

obvious relationship between the GS and WS pay systems, there was a necessary and obvious relationship between the ATC and GS pay systems.

As Petitioners alleged in their complaint, their transfer to higher grade facilities in 1999 should have consisted of these two steps: (1) transfer from their Level 1 Facility to a higher grade facility in 1999 ***while under the GS pay system*** thus triggering the right to have 5 U.S.C. § 5334(b) apply to them at their higher grade facility, and (2), then conversion into the ATC pay system at their higher grade facility based upon their GS grade and step level at their higher grade facility. (See, *e.g.*, Plaintiffs' Complaint at ¶¶46, 50, 51, 53, 60, and 61; App. 46A-51A.) The court of appeals incorrectly found that Petitioners were transferring from a GS to a non-GS position in 1999 and thus were not entitled to have §5334(b) apply. However, that court, in making that finding, impermissibly rejected Petitioners' aforementioned factual allegation within their complaint that they transferred to their higher grade facilities in 1999 *while under the GS pay system.* As such, the court of appeals engaged in an inappropriate exercise of appellate jurisdiction in conflict with Civil Rule 12, *Bach, supra,* and *Wulff, supra.*

Petitioners' GS grade and step determined how they converted into the ATC pay system. An air traffic controller who converted into the ATC pay system, based upon his/her being a GS 10, Step 10, converted into the ATC pay system at a higher level than another controller who converted into that ATC pay system based upon his having been a GS 10,

Step 5. This is because conversion into the AC pay system was based upon one's GS grade and step level. Petitioners seek application of §5334(b) such as to grant them a two step increase in pay while under the GS pay system at their higher grade facilities in 1999, as alleged in their complaint, prior to converting into the ATC pay system at these higher grade facilities. That request is in accordance with §5334(b) and *Clark, supra*. The decision of the court of appeals is in conflict with that statutory provision and this Court's decision in *Clark, supra*.

This Court should grant certiorari and thereafter reverse the decision of the court of appeals, because consistent with this Court's decision in *Clark, supra*, federal employees are entitled to application of §5334(b), when transferring to a higher grade position within the GS pay system.

CONCLUSION

The petition for a writ of certiorari should be granted and thereafter this Court should vacate the Federal Circuit's decision dismissing Petitioners' case on the merits, and remand the case to the court of claims to allow Petitioners to present evidence in support of their claims on the merits and/or for other relief as this Court deems appropriate.

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Respectfully submitted,

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